RECORD AND BRIEF

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In the Supreme Court of the United States

MICHELLE K. LEE, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE,

Petitioner,

v.

SIMON SHAIO TAM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the disparagement provision in 15 U.S.C. § 1052(a) is facially invalid under the Free Speech Clause of the First Amendment because it allows the government to refuse to protect speech it views as "disparaging" to beliefs, institutions, symbols, and persons.

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a non-profit law firm that protects the free expression of all faiths. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. In addition to its work in U.S. courts, the Becket Fund also appears before international tribunals such as the European Court of Human Rights ("ECHR") and the United Nations Human Rights Committee, where the Becket Fund is a Non-Governmental Organisation in consultative status with the Economic and Social Council ("ECOSOC") of the United Nations.

The Becket Fund has long opposed laws restricting speech that is "insulting" or "disparaging" to religion. As the United States and the Becket Fund have argued together in the international context, depriving speech of legal protections because it is insulting or disparaging to a particular religion is dangerous, especially to people of minority faiths. Becket Fund lawyers have published scholarly works on blasphemy laws in other countries,[2] filed briefs opposing domestic

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[1] No party's counsel authored any part of this brief. No person other than *Amicus Curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters indicating consent are on file with the Clerk.

[2] See, *e.g.*, Asma T. Uddin, The Indonesian Blasphemy Act: A Legal and Social Analysis, in *Profane: Sacrilegious Expression in a Multicultural Age* 223-48 (Christopher S. Grenda et al. eds., 2014); Asma T. Uddin, *Blasphemy Laws in Muslim Majority Countries*, The Review of Faith & Int'l Affairs, Summer 2011, at 1

blasphemy laws in Indonesia[3] and Australia,[4] sought to eliminate blasphemy laws still on the books in the United States,[5] and challenged resolutions condemning the "defamation of religions" in the United Nations General Assembly.[6]

[hereinafter Uddin, *Blasphemy Laws*]; Asma T. Uddin, *The UN Defamation of Religions Resolution and Domestic Blasphemy Laws: Creating a Culture of Impunity* (July 14, 2011), http://ssrn.com/abstract=1885770 [hereinafter Uddin, *Culture of Impunity*]; L. Bennett Graham, *Defamation of Religions: The End of Pluralism?*, 23 Emory Int'l L. Rev. 69 (2009).

[3] Amicus Brief of the Becket Fund, Request for Judicial Review of Act No. 1/PNPS/1965 on the Prevention of Mistreatment of Religion and/or Blasphemy under the 1945 Constitution of the Republic of Indonesia (No. 140/PUU-VII/2009) (filed Oct. 20, 2009), http://www.becketfund.org/wp-content/uploads/2012/02/Amicus-brief-to-the-Constitutional-Court-of-Indonesia-filed1.pdf.

[4] Legal Opinion of the Becket Fund, Catch the Fire Ministries Inc & Ors v Islamic Council of Vic Inc [2006] VSCA 284 (Court of Appeal) (Austl.).

[5] Letter from Eric C. Rassbach, Nat'l Dir. of Litig., The Becket Fund, to Robbie Wills, Speaker of the House, Ark. House of Representatives (Feb. 17, 2009), http://www.becketfund.org/wp-content/uploads/2013/09/02-17-09-Letter-to-Rep.-Robbie-Wills.pdf (urging legislature to eliminate anti-atheist provision); Letter from Eric C. Rassbach, Nat'l Dir. of Litig., The Becket Fund, to Bob Johnson, President Pro Tempore, Ark. Senate (Feb. 17, 2009), http://www.becketfund.org/wp-content/uploads/2013/09/02-17-09-Letter-to-Sen.-Bob-Johnson.pdf (same).

[6] See, *e.g.*, The Becket Fund, Statement at the Second Regular Session of the Human Rights Council, United Nations, Geneva (Oct. 4, 2006) (opposing resolution on "defamation of religions"); The Becket Fund, Issues Brief Submitted to the U.N. Office of the High Commissioner for Human Rights, *Combating Defamation of Religions* (June 2, 2008); The Becket Fund, Racism and Religious

The Becket Fund believes that accepting the government's arguments regarding "disparaging" speech in this case would undermine both our domestic tradition of broad and equal protection for religious speech, and the commendable and decades-long stand the United States has taken against blasphemy and anti-disparagement laws around the world.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is about whether the First Amendment allows the government to treat speech it finds "disparaging" worse than other kinds of speech. Citing the potential for trademarks that might disparage religious institutions or beliefs—for example, "demeaning illustrations of the prophet Mohammed and other religious figures"—the government argues that it merely wants to "disassociate itself from offensive communications." Gov't Br. at 10, 39. The government seeks First Amendment warrant for this action by claiming that its refusal to provide equal trademark protection is essentially a decision to "selectively fund a government program." Gov't Br. at 8.

The government's invocation of religious speech demonstrates why its argument should fail. Disagreements about deeply important issues such as religion can often be experienced as disparaging.

Discrimination: Is the Concept of "Defamation of Religions" Productive?, Intervention at the Tenth Regular Session of the Human Rights Council, United Nations, Geneva (Mar. 24, 2009); The Becket Fund, Moving Forward: Religious Defamation and Incitement Laws, Intervention at the Durban Review Conference, United Nations, Geneva (Apr. 23, 2009).

When Richard Dawkins calls belief in God a "delusion" and says that religion is not the root of "all" evil, he certainly disparages religious "institutions" and "beliefs" and "bring[s] them into contempt, or disrepute." 15 U.S.C. § 1052(a). And when Elwood Blues calls Sister Mary Stigmata a "fat penguin," he "disparages" not just her weight but also her religious habit. In both cases, it would be wrong for the government to punish speech simply because it wants to protect some religious "institutions" and "beliefs" from criticism.

In fact, to its credit, the United States has for many decades led the fight to convince other countries and international bodies to allow disparaging speech, and to resist using the law to punish those who disparage religion or commit blasphemy. Internationally, the United States' position sounds much more like the Federal Circuit's opinion than like its own brief in this case—overseas it argues that even disparaging speech should be protected, and only violent acts should be punished. Even when it is intended to protect vulnerable groups, empowering government to punish "disparaging" speech about religious ideas and institutions inevitably ends up privileging entrenched, powerful religious groups.

These universal principles[7] ought to be honored in their own country. The government should not be able to withhold the equal protection of trademark law (or any other law) from speech the government deems

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[7] G.A. Res. 217A, Universal Declaration of Human Rights art. 18 & 19, at 71 (Dec. 12, 1948); International Covenant on Civil and Political Rights art. 19, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171.

disparaging to particular beliefs and institutions. A decision from this Court embracing that kind of government power would endanger minority speech about religion and other issues. It would signal to state, local, and federal government actors that they have a newfound power to selectively withhold the use of a wide range of legal structures—such as deed registries, incorporation statutes, and copyright protection—based on government disapproval of speaker's message.

ARGUMENT

I. The "no disparagement" rule for religious speech is incompatible with true religious freedom.

A. One person's blasphemy is another person's article of faith.

Different people often make competing and irreconcilable claims about deeply important truths. Allowing citizens to freely exchange ideas on these subjects necessarily requires permitting speech that will sometimes be disparaging to competing groups and their religious beliefs and institutions.

For example, Richard Dawkins surely disparages people who believe in God when he calls their faith a "delusion." Richard Dawkins, *The God Delusion* (2008). And he likewise disparages Jews, Muslims, and Christians when he asserts that "the God of the Old Testament" is "a vindictive, bloodthirsty ethnic-cleanser" who is "misogynistic, homophobic, racist, infanticidal, genocidal, filicidal, pestilential, [and] megalomaniacal" all at once. Dawkins 51.

Even those who share a belief in God often disagree deeply about other matters. To take perhaps the most

prominent example, many Christians believe that Jesus of Nazareth was God incarnate; most Jews regard him as a merely human figure; Muslims typically hold that he was an inspired prophet; and some Unitarian Universalists view him as an example for moral living. Many Christians build their lives around the belief that Jesus rose from the dead; millions of others reject the resurrection as a myth. Embracing any one of these competing positions will often entail rejecting the others, and communicating that rejection to others. The historic American approach to deep religious difference has been to allow a robust marketplace of ideas to flourish without state interference. Far from creating a war of all against all, this approach has led to exceptionally low levels of social conflict over religion. See Pew Research Center, *Trends in Global Restrictions on Religion*, Religion (June 23, 2016), http://www.pewforum.org/2016/06/23/trends-in-global-restrictions-on-religion/.

B. Applied consistently, the "no disparagement" rule would restrict free religious discourse and force the government to adjudicate religious differences.

Deep religious disagreements often result in one side disparaging the religious beliefs and institutions of the other, sometimes in very harsh terms. But religious freedom and pluralism in a diverse society require allowing people to disagree about deeply important issues. After all, "freedom to differ is not limited to things that do not matter much" but includes "things that touch the heart of the existing order." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Indeed, many religious traditions

have sprung in part from the rejection of the "beliefs" and "institutions" of another. See, *e.g.*, Christian Scientists, Unitarian Universalists, Society of Friends (Quakers), and Bahá'í. Our courts have long recognized that allowing these differences is a prerequisite to pluralism:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Cantwell v. *Connecticut*, 310 U.S. 296, 310 (1940).

In this case, the government argues that the Patent and Trade Office ("PTO") should be able to exclude any mark that "disparage[s]" a "belief," an "institution" or "persons, living or dead," regardless of the mark's religious content. Gov't Br. at 10 (resisting the conclusion that the federal government should have to register "demeaning illustrations of the prophet Mohammed and other religious figures."). But, when it comes to religious marks, this policy will inevitably lead to government endorsement of a particular religious view. To take one example, the government cannot exclude marks that "disparage" Jesus without taking sides in a millennia-old theological debate over

who Jesus is. Is it disparaging to Jews to call Jesus the Messiah? To Catholics to deny he is the Son of God? To Muslims to say he is anything more (or less) than a prophet? Enforcing a no-disparagement rule in this context would force the government to either exclude all such statements or to pick one particular viewpoint to favor and protect as the truth while others are restricted as disparaging.

Such discrimination among viewpoints cannot be excused by claiming that denial of the legal protections that come with trademark registration is no burden. *Amici* the American Bar Association and the American Intellectual Property Law Association have both pointed out that excluding a mark from the federal trademark system can be "very harmful" and result in "significant disadvantages." ABA Amicus Br. at 19-20 (stating that the court below "may * * * have understated" the benefits of federal trademark registration and the "significant disadvantages" of exclusion from the federal system); AIPLA Amicus Br. at 7 ("[T]he PTO's refusal to register a trademark can be very harmful commercially.").

To date, the "no disparagement" rule appears to have been applied in an inconsistent—or even haphazard—way. AIPLA Amicus Br. at 11 (noting that the PTO denied registration to STOP THE ISLAMIZATION OF AMERICA, while granting registration to STOP THE ISLAMIZATION OF AMERICA in 2015); Resp. Br. at 57 (noting that the PTO "granted registration to HEEB in 2004 as the name of a magazine about Jewish culture, but refused registration *to the same applicant* for HEEB in 2008 as the name of a clothing line[.]") (emphasis added). But in this context, consistency is not necessarily a virtue. If the "no disparagement" rule

were applied consistently to religious marks, the PTO could do one of two things. First, it could decide to be the arbiter of which religious claims about disputed issues would be protected. In this scenario, the losing side would be excluded from the protection of federal trademark law, experiencing "substantial disadvantages" in protecting their marks and suffering harm to their interests. More than that, though, religious groups whose marks are left unprotected will know that the government had picked the winners and losers in these religious debates, and had left them unprotected. Or, second, the PTO could simply deny registration to anything that is remotely religiously controversial. In this scenario, the entire genre of religiously controversial potential trademarks would be off-limits for protection, thus creating an impression by the government that religion is like second hand smoke—too dangerous to protect by trademark. Compare Seamus Hasson, *The Right to Be Wrong* 5-6 (2005) (discussing the bureaucratic impulse to promote social peace by "[r]eplac[ing] all that messy [religious] competition with a wrinkle-free, synthetic, one-size-fits-all culture").

II. The United States has rightly opposed "no disparagement" laws around the world.

Ironically, when other nations have sought to withdraw legal protection from disparaging speech, the United States has been quick to oppose them. For 11 years, the Organisation of Islamic Cooperation (formerly the Organisation of the Islamic Conference) and others advocated for United Nations resolutions—both at the Human Rights Council and in the General

Assembly—condemning the "defamation of religions."[8] These resolutions were closely linked to domestic laws in Pakistan, Egypt, Indonesia, and elsewhere that criminalize speech that "insults" and "outrages" members of a religious group, and effectively withdraws the protection of the law from controversial religious speech. In Pakistan, for example, anti-blasphemy laws have long been used against religious minorities such as in the infamous case of Asia Bibi, an illiterate woman sentenced to death for allegedly insulting the Prophet Mohammed. See Uddin, *Blasphemy Laws* at 1; see also Uddin, *Culture of Impunity*.

The United States, along with the Becket Fund and many other civil society groups, strongly resisted these misguided resolutions. The United States has urged other countries to focus on combating discriminatory and criminal *acts* while protecting hateful *speech*, has emphasized that the U.S. government protects even hateful speech through its court system, and has pointed out that laws against "defaming," "blaspheming," or "insulting" *religion* inevitably draw the government into taking sides on religious questions.[9] In short, when engaging in international diplomacy, the United States sounds much more like

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[8] For a detailed history of these resolutions, see Graham, 23 Emory Int'l L. Rev. 69.

[9] It is easy to see why this is so. Defamation laws typically protect individuals from public slander or libel that would negatively affect their livelihood. The traditional defense is the truth. But when someone says something that allegedly defames a religion, the government cannot assess truthfulness without deciding which religious claim is true.

the Federal Circuit's opinion than its own brief in this case.

For example: In 2009, the United States told the United Nations Office of the High Commissioner for Human Rights that the "best way" to combat disparaging statements about religions and religious groups "is to develop effective legal regimes to address *acts* of discrimination and bias-inspired *crime*" while "vigorously defend[ing] the rights of individuals to practice their religion freely and exercise their freedom of expression."[10] The United States has also emphasized the ways that the American government protects controversial speech, stating that "U.S. courts have upheld the rights of Neo-Nazis, holocaust deniers, and white supremacist groups to march in public, distribute literature, and attempt to convince others of their cause." *Ibid.* And earlier this year, Arsalan Suleman, Acting U.S. Special Envoy to the Organisation of Islamic Cooperation, told the Senate Human Rights Caucus that "[b]lasphemy laws empower the state to be the arbiter of religious truth or orthodoxy, which almost always reflects the views of the majority. When enforced, the end result is that individuals with different beliefs are prevented from fully expressing or carrying out their peaceful religious practice."[11]

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[10] U.S. Gov't Resp. to the U.N. Office of the High Comm'r for Human Rights Concerning Combating Defamation of Religions (Aug. 12, 2009), http://www.state.gov/documents/organization/153526.pdf (emphasis added).

[11] Arsalan Suleman, Acting U.S. Special Envoy to the Org. of Islamic Cooperation, Senate Human Rights Caucus, Russell

The danger from government-enforced prohibitions on disparagement or blasphemy is real. As U.S. officials have acknowledged, social science research shows that "countries with the most restrictions on the exercise of religious freedom, including blasphemy laws, also have the highest level of religious hostilities." *Ibid.*; see generally Brian Grim et al., *The Price of Freedom Denied: Religious Persecution and Conflict in the 21st Century* (2010). Rev. Thomas Reese, S.J., Chair of the U.S. Commission on International Religious Freedom has explained that this is because "[b]lasphemy laws are used disproportionately against religious minorities or dissenting members of the majority community" and are therefore "ripe for abuse."[12]

Examples abound. In November 2014, a Christian couple in Pakistan was beaten and thrown into a brick kiln after the wife was accused of burning pages from the Koran.[13] Police at the scene failed to protect them

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Senate Office Building, Washington, D.C. (May 26, 2016), http://www.state.gov/s/rga/rls/remarks/257830.htm.

[12] Rev. Thomas J. Reese, S.J. Chair, U.S. Comm'n on Int'l Religious Freedom, Testimony Before the Tom Lantos Human Rights Comm'n On Blasphemy Laws and Censorship by States and Non-State Actors: Examining Global Threats to Freedom of Expression, 2 (July 14, 2016), https://www.uscirf.gov/sites/default/files/Testimony.Chair%20Thomas%20J%20Reese.pdf (Reese Statement).

[13] In an unusual move, Pakistan's anti-terrorism court later sentenced five of the men who killed the couple to death. *Five Men Sentenced to Death for Burning Christian Couple Alive*, Christianity Today, Nov. 29, 2016, http://www.christianitytoday.com/gleanings/2016/november/pakistan-death-sentence-burning-christian-couple-alive.html.

and the couple burned to death, orphaning their three children. *Ibid.* In perhaps the most well-known example, Asia Bibi was sentenced to death in Pakistan for allegedly insulting the Prophet Mohammed during an argument over a drink of water. Uddin, *Blasphemy Laws* at 1. She is still in prison today. Reese Statement, 5-6.

Less publicized—but more common—is the use of blasphemy laws to punish voices advocating for change within their own religious tradition. Uddin, *Blasphemy Laws* at 4-5. In 2007, Egypt's blasphemy law was used to convict and imprison Abdel Karim Suleiman, a 22-year-old Sunni Muslim college student who criticized Sunni institution Al-Azhar University on his blog. *Ibid.* Indonesia criminally prosecuted followers of the religious group Sion City of Allah for deviating from "correct Christian teachings"—even though other Indonesian Christian groups asked the government not to do so. *Id.* at 3-4. And in Egypt, laws against blasphemy have been used by Sunni Muslim officials to prosecute Shi'a Muslims for their "deviant" beliefs. *Id.* at 4.

These types of laws use the claimed disparaging nature of religious speech to deprive people of equal protection of the law in the most basic sense—the law will not protect them when they are accused of engaging in disfavored speech. Experience has shown that laws against "insulting" speech are used to target religious minorities and to punish religious reformers. The United States is right to oppose such laws abroad and wrong to leave "disparaging" speech unprotected in this case.

III. This Court should not endorse the notion that governments can withhold equal enforcement of the laws to punish disfavored speech.

To be sure, the government does not think its no-disparagement rule is akin to laws banning blasphemy. Indeed, it repeatedly emphasizes that it has not banned Simon Tam from using his band name. U.S. Br. at 20-21, 25, 26. But the government still seeks for itself the power to determine which speech receives which protections depending on whether ideas or institutions are disparaged.

Although it is a core First Amendment principle that even offensive speech must be protected, see *Snyder* v. *Phelps*, 131 S. Ct. 1207 (2011), the government tries to sidestep the First Amendment because it maintains the list of trademarks and verifies which marks are on the list. Gov't Br. at 10. The government relies heavily on the government speech case *Walker* v. *Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), mentioning it more than 25 times. But *Walker* involved a dispute over who controlled words and images on a state license plate that this Court analogized to a "government ID." 135 S. C. at 2249. Here, by contrast, the closest analogues are the copyright system or a registry of deeds, where the government's system is designed to protect private property. See Pet. App. 47a (concluding that the government acts similarly when it "issues permits for street parades, copyright registration certificates, or, for that matter, grants medical, hunting, fishing, or drivers licenses, or records property titles, birth certificates, or articles of incorporation.").

The government's reliance on the government speech principles set out in *Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460 (2009) is equally unavailing. Gov't Br. at 18-19. In *Summum*, the Court noted an important exception to the government speech rule: "if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message," then the government speech rule would not apply. 555 U.S. at 480. The situation here is more like the exception in *Summum* than the rule laid down in *Walker*. By maintaining a registry of federally recognized trademarks, the government is not putting an imprimatur on every phrase recorded by the PTO.

Moreover, if *Walker* controlled rather than the exception in *Summum*, the government could exclude written works from the copyright system based on their religious content, or refuse to register deeds for buildings owned by religious groups who advocate for positions the government does not like. And since the government's religious preferences may change from election to election, the result could be intellectual and real property rights that come and go depending on which party is in power.

This is not a hypothetical concern. We know that the "no disparagement" rule can lead to such flip-flopping of property rights because that is the actual result of the government's position in the related case concerning the Washington Redskins. There, the Redskins mark was protected by the Johnson Administration in 1967, lost protection as a "disparaging" mark under President Obama's Administration in 2014, and may well regain

protection under President-elect Trump's administration.[14] This type of unpredictability would defeat the very purpose of the trademark, copyright, and deed registry systems, which exist to bring stability and to reduce conflicting claims.

Religious groups have already faced similar problems in the land-use context. As Congress found when it passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000, "religious institutions [are] often treated worse in zoning decisions than comparable secular institutions," and this discrimination "most often impact[s] minority faiths and newer, smaller, or unfamiliar denominations."[15] Indeed, at the time that RLUIPA was passed, "faith groups whose members constitute only nine percent of the population made up 50 percent of reported court cases involving zoning disputes." *Ibid.* (citing H.R. Rep. No. 106-219, 21 (1999); 146 Cong. Rec. 16698 (2000) (Joint Statement of Senators Hatch and Kennedy). The Becket Fund has represented dozens of clients—Muslims, Jews, Christians, and others—in land use disputes like

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[14] *Pro-Football, Inc.* v. *Blackhorse et al.*, 112 F. Supp. 3d 439 (E.D. Va. 2015) (noting loss of registration); *Trump: Some Indians 'extremely proud' of the Redskins*, The Hill, (Oct. 5, 2015), http://thehill.com/blogs/blog-briefing-room/news/255918-trump-some-indians-extremely-proud-of-the-redskins.

[15] Dep't of Justice, Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act (Sept. 22, 2010) at 3, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/rluipa_report_092210.pdf.

these.[16] Very often, minority religious groups encounter government officials who have decided in advance that members of the faith group before them pose a special threat and deserve additional scrutiny.

Religious trademarks are not immune from these dynamics and, as with land use, minority religious groups are likely to be particularly vulnerable. If this Court were to endorse the government's view that it can pick and choose whom to protect in the trademark area because it registers marks and acknowledges them to others, state and local governments across the country could do the same. The result would be government officials using their deed registries; license-granting functions for professions, marriages, and sports; and incorporation statutes to make judgments about what speech and speakers are worthy or unworthy of protection.

In its defense, the government points to some of the most offensive categories of speech—including marks by white supremacists and racist groups that have a history of terrorizing racial minorities, especially African-Americans. But, as Mr. Tam has explained, the disparaging marks law was not enacted to address the threats posed by such groups, and the federal government has far more effective tools to combat them. Resp. Br. at 48-49; see generally Department of Justice, Hate Crime Laws, https://www.justice.gov/crt/hate-crime-laws (visited Dec. 15, 2016) (discussing 18 U.S.C. § 241, 18 U.S.C. § 245, 18 U.S.C. § 247, 18 U.S.C. § 249, and 42 U.S.C. § 3631). Furthermore,

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[16] The Becket Fund, Religious Land Use and Institutionalized Persons Act, http://www.becketfund.org/rluipa/#cases (last visited Dec. 15, 2016).

given that the First Amendment protects so many other public derogatory statements, see *Snyder*, 131 S. Ct. 1207, it is difficult to believe that the threat would grow based on the PTO's allowing or disallowing a particular trademark.

Ultimately, the disparagement rule is a holdover from an era in which commercial speech enjoyed little to no First Amendment protection, and during which our First Amendment case law was in its early stages. Resp. Br. at 48-49 (noting that the rule was first proposed in 1939). The best that can be said of it is that it has been inconsistently enforced, and that many arguably disparaging marks have in practice been registered. See Pet. App. 7a-8a. Striking down the disparagement rule would bring trademark law in line with the rest of this Court's First Amendment jurisprudence.

Upholding the disparagement rule, however, would likely have worse and more far-reaching consequences for the First Amendment. Empowering federal, state, and local governments to withhold legal protections based on the content of speech would needlessly subject minority speech and religious rights to the whims of majority governments and the bureaucrats who staff them. Governments will be emboldened to explain how they too should be able to favor or disfavor certain speakers and institutions by granting or withholding basic legal protections.

In short, it is dangerous to allow the government at any level to withhold equal protection of the law based on the content of someone's speech or religion and to pretend such discrimination is a permissible decision about how to "selectively fund a government program." Gov't Br. at 8.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted.

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